Petition

Office - Supreme Court, U.S.
FILED
OCT 13 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-704

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ROBERT JOSEPH MISKINIS,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT

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QUESTION PRESENTED FOR REVIEW

In seeking consent for a warrantless search, are police officers entitled to intrude physically at gun point into a person's private premises and detain the person, or does such action violate the Fourth Amendment to the Constitution and taint the consent given?

PARTIES BELOW

In addition to the petitioner and respondent as shown in the caption to the instant proceedings, the parties below included, as codefendants of petitioner, Adolph De La Fuente and Ray Elizondo.

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT

OPINION BELOW

An unpublished written opinion was delivered by the California Court of Appeal, Second Appellate District, Division Two, in the proceedings

below. This opinion is attached as Appendix "A" to this petition.

JURISDICTIONAL STATEMENT

The judgment of the California Court of Appeal, subject of review herein, was rendered May 18, 1981. A hearing by the California Supreme Court was denied and the judgment of the California Court of Appeal affirmed August 26, 1981. The order denying hearing by the California Supreme Court is attached as Appendix "B" to this petition. The jurisdiction of the United States Supreme Court to review the proceedings below is invoked pursuant to the provisions of Title 28, United States Code, § 1257(3). Compliance with the time limitations of Rule 20.1, United States Supreme Court Rules, has been had.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution is implicated in the instant case, specifically the provision that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

STATEMENT OF THE CASE

A

Procedural Record

Petitioner and codefendants were jointly charged by information in the Los Angeles Superior Court with violations pertaining to the illegal manufacture of amphetamine [California Health and Safety Code § 11379(a)], possession

of amphetamine for sale [California Health and Safety Code § 11378(a)], and conspiracy to commit the foregoing offenses [California Penal Code § 182]. To these charges petitioner and codefendants pleaded not guilty. (Clerk's Transcript on Appeal, hereinafter designated "C.T.," pages 29-34, 37-38, 48.)

Pursuant to California Penal Code § 1538.5, petitioner and codefendants moved pretrial for suppression of evidence on the ground of illegal search and seizure. (C.T. pp. 79-83, 87-90, 106.) Following an evidentiary hearing, the motion was denied except for certain items not pertinent to the present proceedings. (C.T. pp. 110-113.)

Petitioner thereafter pleaded guilty to count II of the information (illegal

manufacture of amphetamine) and was sentenced to the California state prison for a term of two years. (C.T. pp. 18-27, 114, 120-121.)

An appeal was timely filed and execution of sentence stayed, and the issue of unlawful search and seizure was raised as the ground for appeal. (C.T. p. 129.) The issue was decided adversely to petitioner by the California Court of Appeal, and the judgment of that Court was allowed to stand by the California Supreme Court. (App. "A" and "B.")

B

Factual Summary

The factual summary following is supported by appropriate page references to the Reporter's Transcript on Appeal, hereinafter designated "R.T."

The parties stipulated that no arrest warrant or search warrant was had in the case. (R.T. pp. 9-10.)

In January, 1978, Thomas Ferris, a Los Angeles Police Officer assigned to the Narcotics Division, received information from a Drug Enforcement Administration agent in Boston that a chemical company there had received an order for a large quantity of a chemical called Lithium Aluminum Hydride (LAH) from Rommec Engineering, a machine shop in Los Angeles. The order was made by Bob Miskinis, and previous large orders of LAH had also been made by him. Ferris knew that LAH was used in the manufacture of amphetamine, and neither he, nor the DEA agent, nor a police chemist he conferred with could think of

any use for the chemical in a machine shop. (R.T. pp 10-19.)

Ferris arranged for a controlled delivery of the LAH and set up a surveillance of Rommec Engineering. The company occupied unit 18 at 7943 Haskell. The location was a small industrial complex consisting of two rows of buildings separated by a driveway extending west from Haskell. Each row contained about twenty separately numbered units. Unit 19 was directly across the driveway from unit 18. The chemical delivery was receipted for at unit 18 by a middle-aged man who signed his name "Michinis" and who said he didn't know what the shipment consisted of because it was his son's. (R.T. pp. 19-24.)

The delivery was made and surveillance commenced February 1, 1978. That afternoon petitioner arrived at the location in a car, entered unit 18, then a short time later walked across the driveway into unit 19, and a few minutes afterward returned to unit 18. Petitioner then left the location in his car. He was not seen again until the following afternoon when he arrived in a truck with his sister. In the meantime the premises were locked up on February 1, and reopened on February 2, by the man who received the LAH delivery. He was later determined to be petitioner's father. (R.T. pp. 24-31.)

When petitioner and his sister arrived on February 2, they parked next to unit 19. They both entered unit 18 and then came out carrying the LAH boxes

delivered the day before and brought the boxes into unit 19. Afterward they made several trips back and forth between the two units but were not observed to be carrying or moving anything else. Later that afternoon a large delivery-type van drove into the driveway and backed into the overhead garage door area of unit 19 so that the rear of the van was inside the building. The occupants of the van were codefendants Elizondo and De La Fuente. They met with petitioner and his sister, and from time to time the four of them walked back and forth between unit 18 and unit 19. Petitioner and his sister were then seen to put some boxes and containers into their truck and leave the location. Ferris decided to have them followed because the boxes may have contained LAH, and

Officers Wanek and Markowitz proceeded after them. (R.T. 3140.)

The officers knew petitioner's sister because she had worked as a secretary at the Police Department and was married to a police officer. As Wanek and Markowitz followed the truck, it appeared to them that they had been recognized, so they decided to stop and question petitioner and his sister about the activity seen at the Haskell premises and the LAH there. Following the stop, Wanek advised petitioner of his Miranda rights and then asked for permission to search the truck. Petitioner said to go ahead but to be careful because LAH was present and could be dangerous when wet and it was starting to mist at the time. Wanek looked into the cab of the truck and

observed the LAH. He then asked petitioner for permission to search unit 19. Wanek testified that petitioner said it was alright but he couldn't give permission because it was his father's place and the officers would have to get his father's consent to search it. Wanek then contacted Ferris by radio and related the foregoing to him. (R.T. pp. 311, 339.)

Petitioner presented evidence respecting his proprietory interest in unit 19; and the trial court concluded that under the circumstances joint dominion and control over unit 19 was had by petitioner and his father and that petitioner had conditioned his consent to search on consent also being given by his father. (R.T. pp. 423-424, 441-443, 447, 507.) The court, however,

found such consent to have been validly given by petitioner's father and accordingly upheld the search of unit 19 which ensued. (R.T. pp. 532-533.) The manner in which that consent was acquired thus must be considered and is the focal point of the instant petition.

After the radio call from Wanek, Ferris, accompanied by Officers Stanley, Felix, and two others, all in plain clothes, proceeded to unit 18. Stanley, who participated in the controlled LAH delivery the preceding day, was familiar with the layout of the premises and had described it to Ferris. The exterior door led into a hallway about twelve feet long. To the right was a solid wall; to the left was a wall three to four feet high with louvered panels

extending the remaining distance to the ceiling. At the end of the hallway was a swinging Dutch door, the bottom half about three to four feet high. Past the Dutch door was the workshop area which also extended to the left of and behind the louvered panels. (R.T. pp. 44-45, 228-230, 264-267.)

Ferris first banged on the outside door and said "Police officers, narcotic investigation," in a normal voice. There was no response. At this time he did not know where the people under surveillance were, so he entered the front door, which was unlocked and possibly slightly ajar, followed immediately by Stanley and Felix, and ran to the end of the hallway toward the Dutch door. At this time Ferris had his badge out and may have had his gun

drawn; Stanley and Felix had their guns out. The lower half of the Dutch door was closed and the upper part open. When Ferris got to it he could see over it and around the louvers to his left. At that point he observed petitioner's father sitting at a table and codefendants Elizondo and De La Fuente standing beside him. He proceeded through the Dutch door, followed by Stanley and Felix, and confronted the three men. In proceeding through the Dutch door the officers did not wait for any response from the people inside, and only after entering the work shop area and determining the men had no visible or accessible weapons did the officers holster their guns. (R.T. pp. 41-58, 272-302.)

Ferris approached petitioner's father and identified himself. Stanley and Felix took charge of Elizondo and De La Fuente and escorted them outside. At this time the three men were under detention as far as Ferris was concerned, and he was certain he gave them the impression they were not free to leave. (R.T. pp. 210, 216-217, 260, 300-302.)

Ferris told petitioner's father that petitioner and his sister had been stopped, that chemicals had been found with them, that more chemicals were in unit 19, and that the officers wanted to search that unit. He also told him that he was not being arrested and was not a suspect, that all they wanted to do was search unit 19, and that petitioner said it was alright but that they had to get

his father's consent, too. Petitioner's father responded by saying either, "Go ahead, you can search" or "I don't care." (R.T. pp. 48-50.)

A search of unit 19 followed and the contraband subject of the charges in the case discovered. The legality of that search, under the circumstances presented, is the issue at bar.

ARGUMENT

The hallmark of a free society is the recognition and observance of the law by those directed to enforce it. Nowhere, perhaps, is this concept more ingrained than in the area of individual privacy and liberty where it is given concrete expression by the Fourth Amendment. **Camara v. Municipal Court**, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).

As a consequence, the Court has delineated clear limits to proper police conduct where the privacy and freedom of the individual are at stake and has repeatedly refused to sanction police intrusions exceeding those limits.

In two salient and related particulars, the action of the Los Angeles Police Officers in this case patently exceeded the parameters of lawful police conduct as established by precedent authorities under the Fourth Amendment.

The first violation consisted of the illegal intrusion by the officers into the private work shop area of unit 18. The second, and interrelated, violation was the unlawful detention of petitioner's father at that location. In both particulars the law was disregarded

or ignored by those entrusted with its enforcement, and deprivation of Fourth Amendment rights resulted.

A

Illegal Entry

It has long been recognized that business and commercial premises are within the protective purview of the Fourth Amendment. Government agents and public officers may not, therefore, enter onto the private areas of such premises without permission or probable cause, whether to search or inspect.

Marshall v. Barlow's, Inc., 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978);

G.M. Leasing Corp. v. United States, 429 U.S. 338, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977);

Mancusi v. De Forte, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968);

See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967);

Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920).

Nor is the situation altered because the purpose of the officers is to conduct an interview. The desire to interview a person conveys no right to enter his premises to do so; permission must first be had or the officer must stop at the door. This limitation is well established and consonant with the basic purpose of the Fourth Amendment which the Court has recognized to be "to

safeguard the privacy and security of individuals against arbitrary invasions by government officials." **Camara v. Municipal Court, supra,** 387 U.S. at p. 528, 87 S.Ct. at p. 1730. The principle applies equally to commercial and business premises as to residences, and "the businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." **See v. City of Seattle,** 378 U.S. at p. 543, 87 S.Ct. at p. 1739.

It is recognized, of course, that commercial and business premises differ from residences in one particular: ordinarily there is a portion of such premises open and accessible to the public. Certainly, police entry into

the public portion would be consonant with Fourth Amendment considerations. But that limited right of entry does not extend ot the private areas of the premises; otherwise the protection of the Fourth Amendment would be completely obviated.

In most instances the demarcation between the public and private areas of a business is clear, and opaque barriers and closed doors are not required to denote it. The reception room of a medical or legal suite, for instance, is distinquishable from the office area used by the doctors, lawyers, secretaries, and technicians, even if the door between them is left open. The shopping portion of a retail store is similarly set apart from the storage area notwithstanding an open doorway or passageway

between them; and repair and service shops typically have a division between the customer area and rear portion of the premises where the work is done. In all of these locations, limited entry only is provided the public; and law enforcement officers have no greater right absent consent or probable cause.

The same situation obtains with repect to the machine shop in the instant case. As Officer Stanley must have observed when he helped deliver the LAH, and as Officer Ferris must have realized when the premises were described to him, there was a hallway or entranceway from the exterior door allowing public access up to the Dutch door. But whether the Dutch door was closed completely or partially opened,

the area beyond was plainly the private work area of the premises.

It is difficult to understand, therefore, why Ferris determined to announce his presence outside the premises rather than inside at the Dutch door and why at that point he and his fellow officers physically forced their way into the workshop area without waiting for an acknowledgment and permission to enter. But it is clear that in doing so the officers exceeded their authority under the Constitution, as set forth in the cited cases; and the unlawful entry should not receive court sanction as a valid basis for securing consent to search.

B

Illegal Detention

The sudden appearance in this case of three men, two, at least, with guns drawn, rushing into a private workshop and converging on the occupants, creates at the outset a restrictive, as well as frightening, situation. That the officers intended to take charge of those present was immediately manifested by their removal of two of the people from the premises. Moreover, Ferris acknowledged in his testimony that his intent was to detain the persons present, and he was certain he conveyed the impression to them that they were not free to leave.

Under these circumstances a detention has occurred. As the Court has stated succinctly and clearly:

> "We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."
> **United States v. Mendenhall**, ____ U.S. ____, 100 S.Ct. 1870, at p. 1877, ____ L.Ed.2d ____ (1980).

Nor can the detention which occurred in the present case be justified. Petitioner's father was not a suspect in criminal activity. Moreover, as shown, the detention followed immediately upon an unlawful entry onto the premises by the police. Police officers are simply

not authorized in the absence of probable cause, to intrude on a person's privacy and seize him, even if only for the purpose of interview.

The legal consequence of such police acton is equally clear. As expressed by the Ninth Circuit Court of Appeals, with reference to a recent decision of this Court:

> "In **Dunaway v. New York**, 422 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), the Court held that custodial detention on less than probable cause constitutes an unlawful seizure of the person under the Fourth Amendment, and that statements obtained during the course of such detention, even though voluntary for purposes of the Fifth Amendment, are tainted by the unlawful seizure and must be suppressed."
> **United States v. Ocheltree**, 622 F.2d 992 (9th Cir. 1980).
>
> See, too, **United States v. Chamberlin**, 609 F.2d 318 (9th Cir. 1979).

Consent to search is included in the foregoing concept; and where consent is given during unlawful detention, it is considered tainted and involuntary and without legal effect.

United States v. Perez, ____ F.2d ____ (9th Cir. May, 1981); **United States v. Mendenhall, supra.**

Under the circumstances of the present case, as reflected in the record, petitioner's father's consent to search unit 19 must be deemed invalid as the consequence of an unlawful detention. To conclude otherwise would ignore controlling precedent and do violence to the pronouncements of this Court. No other basis for the search

was presented, and the search, therefore, constituted illegal police action.

Petitioner may properly contest the illegal search of unit 19 since the trial court found that he exercised joint dominion and control over those premises. Accordingly, he had a legitimate expectation of privacy therein, **United States v. Salvucci**, ____ U.S. ____, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980), and the fruits of the search should have been suppressed on his timely motion below. The failure to do so was error of clear constitutional dimension and should be remedied by appropriate action of this Court.

CONCLUSION

For all of the reasons presented, this petition should be granted. The protection of the individual's right to be secure within the privacy of his premises and to be free of illegal detention is of paramount importance in our society. In this respect the instant case presents an issue of broad application and recurrent character, and it provides a clear forum for definitive Court expression on the limits of proper police conduct under the Fourth Amendment when seeking interviews to obtain consent for warrantless searches. The Court should pronounce itself firmly and unequivocally on this matter to assure uniform law enforcement nationally. Such action will not tend to diminish law enforcement; rather it will serve to

strengthen and give vitality to our system of constitutional jurisprudence, and is called for at this time.

Accordingly, it is requested that the within petition for writ of certiorari be granted and the matter be set for hearing on the Court's docket.

Respectfully submitted,

HOWARD E. BECKLER

Attorney for Petitioner

APPENDIX "A"

NOT FOR PUBLICATION

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ROBERT JOSEPH MISKINIS, RAY ELIZONDO, and ADOLPH DE LA FUENTE,

Defendants and Appellants.

2D CRIM. NO 37512

(Super.Ct.No. A139755)

FILED: MAY 18, 1981
CLAY ROBBINS, JR., CLERK

Following pleas of guilty to violations of Health and Safety Code section 11379 (unlawfully manufacturing amphetamines), appellants Miskinis, Elizondo and De La Fuente were sentenced to state prison for the respective terms of two, three and two years. The appeals are from the judgments of conviction, agreeably with penal Code section 1538.5(m). 1/

The evidence occasioning the prosecution herein, viewed most favorably in support of the judgments, fairly disclosed the following:

1/ The statute provides in pertinent part that:

"A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty."

William H. Yout, a special agent employed by the United States Department of Justice and assigned to the Drug Enforcement Administration (DEA) in Boston, Massachusetts, had experience with laboratories engaged in the illegal manufacture of amphetamine and methamphetamine. In July of 1977, Yout received information from Ventron Corporation, a Denver, Massachusetts chemical supply house, that the Rommec Engineering Company, located in Van Nuys, California, was ordering large amounts of Lithium Aluminum Hydride (LAH). Yout understood LAH to be a reducing agent that could be used in the manufacture of amphetamines. Ventron had been supplied with a list of chemicals compiled by chemists specifying those chemicals most commonly used

as precursors in the manufacture of illegal narcotics in clandestine laboratories. In the course of his enforcement duties Yout would typically visit Ventron once a week and speak with Ventron personnel once a day, inspect matters brought to his attention and view purchase orders.

In this case he was shown a copy of a July 1977 purchase order for two kilograms of LAH requesting that the order be sent to Rommec at 7943 Haskell avenue, Van Nuys, California. Yout also learned that in March of 1977 Rommec had ordered two kilograms of LAH from Ventron.

Sometime between July 1977 and January 1978, Yout telephoned Rommec from Massachusetts in order to determine

whether Rommec was, in fact, an engineering company and was satisfied that Rommec was a machine or tool and die company. Yout then obtained a commitment from Ventron to advise him of any future orders placed with them by Rommec.

In January of 1978, Yout received a telephone call from a Ventron representative who advised him that Rommec had placed another order for LAH. Yout went to the Ventron office and reviewed the Rommec invoice which contained an order for four kilograms of LAH and had been placed by appellant Robert Miskinis. When Yout conferred with a DEA chemist, he was told that LAH was an anomolous product for a machine shop engaged in tool and die work. The chemist also stated that while LAH could be used in

research, the quantity in question, being excessive, would not indicate such a use.

When the January order was ready for shipment, Yout advised Ventron that he wanted to effect a "controlled delivery" of the chemical to California. He thereafter contacted Officer Thoms Ferris of the Los Angeles Police Department, Narcotics Squad, advising him of the situation. Ferris also knew LAH was used to manufacture amphetamines and he agreed to make the controlled delivery.

Ferris then proceeded to the Rommec location and observed a card which contained the words "Rommec Engineering" on the door of unit 18. This office was located in an industrial complex consisting of two rows of industrial

buildings, each row of which runs west from Haskell Avenue and contains about twenty units. Each unit has its own number. He thereafter discussed this case with his fellow officers Stanley, Wanek, Felix and Markowitz.

On February 1, 1978, Officer Ferris proceeded to Federal Air Express in Burbank at about 7:30 a.m. and retrieved two wood boxes containing the LAH. These were packed into an Air Express truck for transportation to the Rommec location on Haskell after the officer made arrangements with the driver to meet at that location. Ferris then proceeded to the same location and set up a surveillance there with Officer Stanley and the other officers mentioned. Stanley entered the truck when

it arrived in order to monitor the delivery of the boxes.

When the truck arrived at unit 18, Stanley took the crates of LAH and the invoices and carried them into the shop where he was met by appellant Miskinis' father, Mr. Michinis. 2/ When Stanley asked him what he used LAH for, Mr. Michinis stated that it belonged to his son and he did not know what the latter used it for. This information was later conveyed to Ferris. During the delivery, Stanley was able to see inside the location and observed machine tool-making equipment.

2/ Miskinis' father's surname was, as indicated, spelled differently than his son's. Though variously formulated in the transcript, we adopt the version of the name specified.

At about 5 p.m. the same day, the police surveillance continuing, a Porsche containing two males drove into the location. The driver fit a description of Miskinis that Officer Ferris had obtained from the Department of Motor Vehicles. Both men exited the Porsche and entered unit 18. Shortly thereafter Miskinis entered unit 19 which was located across the driveway. [3/] After a short time, he returned to the car and left. Ferris and Stanley followed him to UCLA where he was seen to enter the student union store and look at several chemistry books.

[3/] It was adequately established at the hearing on the suppression motion that unit 18 was solely controlled by Mr. Michinis; unit 19 jointly by Mr. Michinis and Miskinis.

At about 7:30 a.m. the next day, Ferris resumed his surveillance at Rommec and observed Mr. Michinis drive up to unit 18 at about 8 a.m., unlock unit 19, remove a heavy item from the trunk of the car, carry it into unit 19, leave it there and then enter unit 18.

After noon, a Ford pickup truck arrived at the location and parked next to unit 19. It was being driven by Miskinis' sister, Sandy Nelson, with Miskinis as a passenger. Officers Ferris, Stanley, Wanek and Markowitz knew Sandy inasmuch as she had previously been employed as a secretary for the Los Angeles Police Department and had been assigned to the Narcotics Division. Officer Wanek also recognized Miskinis as someone he had seen several weeks earlier at a chemical company in

Canoga Park called the Chemical Shed, while the officer was on an unrelated narcotics investigation. The owner of the company had told Wanek that Miskinis was a chemist and a customer of the store. According to Wanek, the Chemical Shed sold chemicals to "anyone that will walk in the doors, mostly for cash."

Sandy and Miskinis were then seen to each carry one of the boxes containing LAH from unit 18 to unit 19. At this time, Ferris and Stanley also observed a large white General Motors delivery-type van, occupied by appellants Elizondo and De La Fuente, back into the garage area of unit 19 so that the rear doors of the van opened into the inside of the building. The officers subsequently observed a lot of traffic among these four people between units 18 and 19 and

at one point appellant Elizondo carried a heavy item which appeared to be the head of a pill press from unit 19 into unit 18. Thereafter, Sandy and Miskinis were seen taking boxes and containers from unit 19 and loading them into the back and front portion of the pickup truck. Sandy then drove the pickup truck out of the industrial complex, with Miskinis again a passenger. The pickup truck was followed by Officers Markowitz and Wanek in unmarked police vehicles.

The pickup truck proceeded onto the San Diego Freeway, southbound toward West Los Angees. At one point Wanek observed Sandy turn around and wave at both him and Officer Markowitz, such that it was apparent she and her passenger knew they were being

followed. Wanek informed Ferris of the fact by radio and the officers were of the opinion that Miskinis and Sandy should be stopped to prevent them from getting back to the storage area or getting to a telephone and "blow[ing] the whole case." Wanek thereupon motioned for Sandy to pull to the side of the freeway. Wanek, according to his testimony, based his decision upon the following factors: his conversation several weeks prior to this investigation with the owner of Chemical Shed, who had told him Miskinis was a chemist and was a good customer; his investigation of others involved in the illegal manufacture of drugs and who purchased their supplies at the Chemical Shed; the fact that on an earlier occasion Sandy had told him that Miskinis was a

chemistry major at UCLA; all the information relating to the case, as hereinbefore described; and on his 25 years experience as a police officer, 15 of which had involved narcotics investigations of clandestine laboratories.

When the pickup truck stopped, Sandy and appellant Miskinis exited. Wanek explained that he was conducting a narcotics investigation. Miskinis responded that he was aware Wanek was a police officer. Wanek then provided Miskinis with his constitutional rights, to which Miskinis responded he did not want an attorney present and that he was willing to talk. Wanek then asked for and obtained Miskinis' consent to search the pickup truck and units 18 and 19, the latter conditioned upon consent also being obtained from Mr. Michinis. At

least some of the LAH was found in the front portion of the truck. The request for consent to search the units was made within one or two minutes after Miskinis had been stopped. The response to it was then conveyed by radio to Ferris and Stanley.

The latter met with Officer Felix and perhaps one or two other officers and they proceeded to unit 18. All were in plain clothes. The entry door was "maybe halfway, three-quarters open" at the time they approached it. Ferris "banged" on the door and in a normal speaking voice said, "Police officers, narcotic investigation. . . ." There being no reply, the officers went inside. As they entered, Ferris saw that they were in a hallway about 12 feet long, the right side of which was

solid wall and the left side of which was solid wall about four feet high, topped by vertically parallel wood louvers from there to the ceiling. Stanley, Felix and Ferris had their guns drawn. According to Stanley, one could see through the louvers from a certain angle.

The end of the hallway contained a swinging "Dutch" door, opening into a machine shop, the bottom part of the door being about three or four feet high. When Ferris reached the end of the hallway and arrived at this door, he looked beyond it to his left, and saw Mr. Michinis sitting at a desk, with appellants Elizondo and De La Fuente standing next to him. The latter were looking at the officers and there was an item on the desk that looked to Ferris

like "a pill press and a bench, a series of punches and dies, for a pill machine." Ferris did not recall seeing any signs on the "Dutch" door reading "private" and "employees".

Ferris, with his badge out, informed Mr. Michinis in a normal speaking voice that he was conducting a narcotics investigation and wanted to talk to him. Mr. Michinis was positioned about ten feet from the door. When he began this statement Ferris was still at the door and then he walked closer to the men, holstering his gun as he entered the machine shop. Stanley and Felix followed suit, then escorted De La Fuente and Elizondo outside.

Officer Ferris informed Mr. Michinis about the stopping of appellant Miskinis and Sandy and indicated he wanted to

look inside unit 19. He likewise told him that he was not under arrest, was not going to be arrested and that he was not a suspect. He also related to Mr. Michinis that appellant Miskinis had said it was all right to search if Michinis gave permission. Mr. Michinis, not appearing to be frightened, responded by saying "[s]omething like, 'Go ahead. You can search' or 'I don't care.'"

After telling Mr. Michinis to stay around, Ferris proceeded to the wide open entry door to unit number 19. Inside, he saw one of the boxes previously containing LAH had been opened. He also saw a laboratory, including chemicals and chemical-type glassware and boxes, and glass bottles containing orange liquid on the floor.

He was also able to see into the back of the van and he observed there what appeared to be a pill machine, an extension cord, a motor driven cement mixer and some lactose. It appeared to him to be a mobile laboratory. Once inside the van he saw that the pill machine was bolted to the van floor and observed other items having to do with contraband drugs.

Ferris thereafter radioed Wanek with instructions to arrest Miskinis. Wanek had already let Miskinis and Sandy go, in that Sandy some ten minutes after being stopped had asked the officers whether she and her brother were under arrest and when told they were not, left. The pair was nevertheless relocated in the pickup truck and

Miskinis was arrested, as were appellants Elizondo and De La Fuente.

Appellants' contentions on the appeal are as follows:

1. Appellant De La Fuente contends that the action of DEA Agent Yout in obtaining the purchase orders sent by appellant Miskinis to Ventron constituted a violation of De La Fuente's state and federal constitutional privacy rights and tainted the seizure of the contraband.

2. Appellants De La Fuente and Elizondo contend that the detention of Sandy and appellant Miskinis was illegal and tainted the subsequent consents to search and the evidence seized therefrom.

3. Appellants De La Fuente and Miskinis contend that the officers

entered unit 18 in violation of both Mr. Michinis' Fourth Amendment privacy rights and Penal Code section 844 and that this unlawful entry tainted both Mr. Michinis' consent to search unit 19 and the contraband uncovered as a result of the search.

4. Appellant De La Fuente contends that Mr. Michinis' consent to search unit 19 was involuntary and obtained as the result of his acquiescence to a claim of lawful authority.

5. Appellant De La Fuente contends that the search of the van was unlawful since Mr. Michinis did not consent to it and had neither actual nor apparent authority to do so.

We affirm the judgments of conviction based on our conclusion the contentions raised are without merit.

Respecting the first of them, it is urged reversal is required owing to the decisions in People v. Blair (1979) 25 Cal.3d 640, Burrows v. Superior Court (1974) 13 Cal.3d 238 and People v. Kunes (1975) 51 Cal.App.3d 487. In these cases access by authorities without adequate legal process to records of an individual's credit card charges, banking transactions and telephone calls, in the hands of those to whom the information was communicated as an ordinary concomitant of the respective events, was condemned as in violation of article 1, section 13 of the California Constitution because such records provided a "virtual current biography" of the individual. The same should be the case, it is maintained, on the facts present here. We disagree.

The purchase orders in question, far from providing the kind of activity summary which reveals upon its inspection numerous aspects of an individual's "personal affairs, opinions, habits and associations" (People v. Blair, supra, 25 Cal.3d 640, 651), were confined to showing the fact a certain quantity of a chemical substance had been requested for sale, together with a specification by name and address of the party to whom the sale was to be made. Such a communication, in our view, not only fails to supply any biographical information of the sort described in the cases cited, but is, as well, not of the kind with respect to which one might reasonably entertain an expectation of privacy. (See People v. Elder (1976) 63 Cal.App.3d 731, 737-738.) Accordingly

no infringement of appellants' rights under the Constitution of this State arises out of its disclosure under the circumstances referred to. 3/

The same is true, of course, insofar as is concerned a like right under the Fourth Amendment to the Constitution of the United States. (See Smith v. Maryland (1979) 442 U.S. 735; United States v. Miller (1976) 425 U.S. 435.)

Similarly without support is the claim the detention of appellant Miskinis and his sister Sandy was without legal justification, under the

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3/ That the search itself occurred in Massachusetts is in our view, without significance and creates no necessity for us to consider the law of that jurisdiction on the question, since the privacy right sought to be asserted is that of one who was at all pertinent times a California resident. (See People v. Blair (1979) 25 Cal.3d 640, 656.)

standard articulated in In re Tony C (1978) 21 Cal.3d 888 and in view of the decision in Dunaway v. New York (1979) 442 U.S. 200.

In the first of these, our Supreme Court concluded that:

> "Balancing these factors, the courts have concluded that in order to justify an investigative stop or detention the circumstances known or apparent of the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so: the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience (People v. Superior Court (Kiefer) supra, 3 Cal.3d at p. 827), to suspect the same criminal activity and the same involvement by the person in question. The corollary to this

> rule, of course, if that an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith. (Terry v. Ohio, supra, 392 U.S. at p. 22 * * *.)'"
> (In re Tony C., supra, 21 Cal.3d 888 at p. 893.)

Without reiterating at length the "specific and articulable facts" known to Officer Wanek at the time he effected a stop of the pickup truck, it is enough to say we have no doubt they were sufficient for the purpose under this formulation. And this is true in spite of the fact Wanek's immediate motivation for the detention was associated with his awareness he and his psrtner's surveillance had been discovered, since it seems clear that that precipitating event was not itself the reason the detention was undertaken.

Nor is our conclusion varied in light of the proscription deriving from Dunaway, a case which, in our view, stands for no more than the proposition that a claimed "detention" which in fact constitutes custodial restraint on less than probable cause for arrest is a seizure violative of the Fourth Amendment. In this respect it is urged the fact Wanek proferred a Miranda warning to Miskinis requires ipso facto the conclusion Miskinis was in custody. Such is not the case, either in theory or on the facts present. The rule of Miranda is that its admonitions are necessary to justify custodial questioning, not that the giving of the warnings creates the custodial setting. On the record here, Wanek's premature advisement to Miskinis of his constitutional

rights does not obscure the fact Miskinis and his sister were not under arrest, or in custody, but were free to leave at any time upon request, and indeed did so.

Appellants' third contention must also be rejected. At the outset on this point, we are satisfied the provisions of Penal Code section 844 [4] are without application in that (1) the initial entry into unit 18 was made through a substantially open door into a business establishment open to the public (see People v. Lovett (1978) 82 Cal.App.3d

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[4] "To make an arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired."

527), (2) the entry through the half-open Dutch door was preceded by Officer Ferris' announcement to the visible occupants of his status as a policeman conducting a narcotics investigation, and (3) the purpose for the officers' presence in the unit was not to make an arrest.

We are likewise satisfied no unlawful intrusion was made into the area of the business establishment beyond the Dutch door in contravention of a reasonable expectation that area was private, such that the entry therein by the police officers was in itself sufficient to taint any subsequent consent to search obtained from Mr. Michinis. Thus it appears there was substantial evidence to support the conclusion the officers here, after entering during business

hours a place of business open to the public, proceeded down a short hallway, the top half of one side of which was covered by vertical parallel louvers which at a certain angle provided visual access to the office area on the opposite side, to an unlocked Dutch door, the top half of which was open, from where, without entering, Officer Ferris could and did see the machine shop within and Mr. Michinis, Elizondo and De La Fuente in the office area to the side. As entry through this door was made, accompanied by Officer Ferris' announcement of its purpose, that trio was itself engaged in collectively observing the officers. Under these circumstances, the suggestion access was obtained unlawfully is not one we find persuasive.

The intrusion being reasonable, we similarly find unacceptable the notion the consent given by Mr. Michinis to the search of unit 19 was not freely and voluntarily given. So, even if it is conceded Officers Ferris, Stanley and Felix inititally entered unit 18 with guns drawn, substantial evidence, relied upon by the trial court, also adequately established the weapons were holstered upon entry past the Dutch door, that Mr. Michinis was advised he was not being arrested nor was he a suspect, and that his response to the request for permission to search was "very quiet," "very low key," such that he was not frightened and "there was no excitement or hassle or anything like that."

Finally, we reject appellants' contention the search of the van was

illegal in that it is abundantly clear its contents were observed in plain sight through the van's open rear doors following authorized entry into unit 19 (See Lorenzana v. Superior Court (1973) 9 Cal.3d 626, 634.)

The judgments appealed from are affirmed.

NOT FOR PUBLICATION

ss: ROTH, P.J.
ROTH

We concur:

ssFLEMING, J.
FLEMING

ssBEACH, J.
BEACH

APPENDIX "B"

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

[illegible]

I have this day filed Order

HEARING DENIED

In re: 2 Crim. No. 37512

People

vs.

Mickinis

Respectfully,

Clerk

by